No. 11252

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. Greenway Albert and Maja Greenway Albert, husband and wife,

Appellants,

vs.

Ira F. Jones,

Appellee.

Opening Brief of Appellants H. Greenway Albert and Maja Greenway Albert, Husband and Wife.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

No. 16222

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. Greenway Albert and Maja Greenway Albert, husband and wife,

Appellants,

vs.

Ira B. Joralemon,

Appellee.

Opening Brief of Appellants, H. Greenway Albert and Maja Greenway Albert, Husband and Wife.

Jurisdictional Basis.

Appellants are residents and citizens of the State of Arizona and Appellee is a resident and citizen of the State of California. The amount in controversy exceeds the sum of $3,000.00 exclusive of costs and interest. Jurisdiction of the District Court of the United States for the District of Arizona in this matter is based upon the above facts, alleged in Plaintiff's Complaint, page 3 of the printed record, as amended by oral stipulation at the time of trial, page 89 of the printed record.

Title 28, U. S. C. A. 1948, Sec. 1332.

This appeal is taken from a Judgment of the District Court of the United States for the District of Arizona entered June 18, 1958. This Court has jurisdiction of appeals from all final decisions of the District Courts of the United States.

Title 28, U. S. C. A. 1948, Sec. 1291.

Notice of Appeal from such Judgment to the United States Court of Appeals for the Ninth Circuit was timely given by Appellants [p. 65, printed record]. Bond on Appeal was timely filed [p. 66, printed record].

Statement of the Case.

On or about September 21, 1956, the Appellee, Ira B. Joralemon, and Appellants, H. Greenway Albert and Maja Greenway Albert, entered into a written contract entitled Lease and Option to Purchase [pp. 116-130, printed record] wherein Appellants leased to Appellee certain unpatented mining claims in Pima County, Arizona. The agreement provided for the payment by Appellee to Appellants of $1,000.00 per month rent, plus a quarterly rental payment of $7,000.00. The agreement provided further that Appellee might terminate the same after the payment of the first quarterly payment of $7,000.00 by giving to Appellants notice in writing of termination, accompanied by an executed and acknowledged quitclaim deed to the leased premises.

As found by the lower court, when the parties entered into the lease and option agreement, it was their intention that Appellee could not terminate the agreement before, nor until, he had made payment of the first quarterly payment of $7,000.00; and it was their intention at that time, also, that Appellee could not terminate the lease before, nor until, he executed and delivered to Defendants a quitclaim deed duly acknowledged, releasing and quitclaiming to Appellants the demised premises [see pp. 55-56, printed record].

On or about November 5, 1956, Appellee mailed to Appellants a letter stating that Appellee was reluctantly forced to surrender the lease and option, stating that the

$7,000.00 payment due November 8, 1956, would be paid when due, and stating, further, that the quitclaim deed provided for in the Agreement would be sent to Appellants as soon as practicable. The letter was received by Appellants in due course of the mail.

On or about November 6, 1956, Appellee by and through his agent mailed to Appellants a check for $1,000.00 representing the regular monthly rental payment and a check for $3,932.15 representing the first quarterly rental payment of $7,000.00 less amounts claimed by Plaintiff to be deductible under the Agreement as legal expense incident to clearing title to the demised premises.

On or about November 16, 1956, the Appellant, Mr. Albert, telephoned Appellee in San Francisco requesting copies of the logs of the five holes drilled by Plaintiff on the leased premises. In that conversation, Mr. Albert expressed dissatisfaction over the remittance made by Appellee on or about November 6, 1956, stating that he believed Appellants had been underpaid. At that time, Appellee agreed to send the drilling logs as requested and explained that the adjustment of the difference between the parties as to money matters would be placed in the hands of Appellee's attorneys. Appellee promptly sent to Appellants the drilling logs requested.

When Appellants received Appellee's letter of November 5, 1956, they understood that the Lease and Option Agreement required Plaintiff to make the $7,000.00 payment and to execute and deliver a quitclaim deed of the leased premises before he could terminate the Agreement. Appellant did not at any time prior to April 16, 1957, give notice to Appellee or make claim to him that the Lease and Option Agreement was not and would not be terminated until the $7,000.00 payment was made and the quitclaim deed delivered.

On or about November 21, 1956, Appellants through their attorney mailed to the Appellee through his attorney a letter asserting that the payment of $3,932.15 was not proper and that Appellee was still indebted to the Appellants on account of the first quarterly payment.

On or about November 26, 1956, Appellee through his attorney responded to Appellant's letter of November 21, 1956, disagreeing with the position of the Appellants and stating that the Appellants would be hearing from San Francisco either direct or through the office of Appellants' attorney.

On or about January 4, 1957, Appellee through his agents mailed to Appellants a check in the sum of $1,286.52 representing an additional payment on account of the first quarterly payment of $7,000.00 accompanied by a letter stating that the remittance of $3,932.15 which was made November 6, 1956, had been the result of an error in computation.

Neither the check for $1,286.52 nor the check for $3,932.15 were negotiated by the Appellants until after the institution of this litigation in the lower court.

On or about May 31, 1957, Appellee through his attorney mailed to Appellants a letter enclosing a quitclaim deed duly executed and acknowledged. Said letter and deed were received by Appellants in due course of the mail. On or about May 31, 1957, Plaintiff deposited the sum of $23,000.00 in escrow in the Tucson downtown office of the Valley National Bank of Phoenix pursuant to the provisions of Paragraph 14 of the Lease and Option Agreement [see p. 126, printed record].

At no time prior to May 31, 1957, did the Appellee deliver or tender a quitclaim deed to the premises to the Appellants.

The total amount paid by Appellee to Appellants under the Lease and Option Agreement and on account of the quarterly payment of $7,000.00 due November 8, 1956, is the sum of $5,218.67.

The failure to deliver the quitclaim deed to the Defendants promptly after November 6, 1956, was occasioned by the oversight of John W. Hamilton, Secretary of Homestake Mining Co., or of some other officer or agent of Homestake Mining Co., and the said John W. Hamilton or such other officer or agent of the Homestake Mining Co. in such oversight was acting as the agent of the Appellee within the scope of his authority.

The failure to make proper remittance in connection with the $7,000.00 quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by Appellee in clearing title to the demised premises and as to the proper pro-ration of such expenditures.

On May 31, 1957, Appellee through his attorneys filed in the United States District Court for the District of Arizona, a Complaint, wherein he sought a declaration of the parties' rights and obligations under the Lease and Option to Purchase Agreement between Appellee and Appellants; an adjudication that the said Lease and Option to Purchase Agreement was terminated by service upon Appellants of Appellee's letter of November 5, 1956; an adjudication that Appellee had paid to Appellants all sums the Appellants were entitled to under said Lease and Option to Purchase Agreement, and an adjudication that Appellee was entitled to all of funds placed in escrow with the Valley National Bank of Phoenix hereinabove mentioned [see pp. 9-10, printed record].

On July 5, 1957, Appellants through their attorneys, filed an Answer to Appellee's Complaint alleging, *inter*

alia, that the said Lease and Option to Purchase Agreement remained in full force and effect until terminated May 31, 1957, and a Counterclaim alleging that Appellee was at that time indebted to Appellants in the sum of $21,179.56 together with interest from due dates, under terms of the Lease and Option to Purchase Agreement [see pp. 19-22, printed record]. It was Appellants' position that the payment of the first quarterly payment of $7,000.00 and the execution, acknowledgement and delivery to Appellants of a quitclaim deed were conditions precedent to the exercise by the Appellee of his option to terminate the contract, and that because of his failure to perform the said conditions precedent, the lease was not terminated by service upon Appellants of Appellee's letter of November 5, 1956.

The trial court, in its Findings of Fact and Conclusions of Law, found that the payment of the first quarterly payment, and the execution, acknowledgement and delivery of the quitclaim deed were conditions precedent to the exercise by Appellee of his option to terminate the contract, but that Appellants waived performance by Appellee of the conditions precedent to Appellee's right to terminate and the Lease and Option to Purchase Agreement was terminated upon such waiver and on or about November 16, 1956.

The court concluded further that Plaintiff-Appellee was bound to pay the $7,000.00 quarterly payment which fell due on November 8, 1956, and deliver the quitclaim deed to the demised premises. Such quitclaim deed was delivered to and accepted by the Defendants-Appellants on or about May 31, 1957. The court found further that there remained due from Appellee to Appellants on account of the first quarterly $7,000.00 payment, a balance

of $1,330.00, following the payments of $3,912.15 and $1,286.52 made by Appellee to Appellants on November 6, 1956, and January 4, 1957, respectively.

Judgment was entered June 18, 1958, for Defendants-Appellants on Count One of their Amended Counterclaim against Plaintiff-Appellee in the following amounts:

(a) Interest at the rate of six per cent (6%) per annum on the sum of $2,616.52 from November 8, 1956, to January 8, 1957.

(b) The sum of $1,330.00, together with interest thereon at the rate of six per cent (6%) per annum from January 8, 1957, until paid.

(c) Costs of suit.

The Judgment was to the further effect that the lease and option was terminated prior to December, 1956; that Defendants-Appellants had no rights under the lease and option beyond recovery of the above amounts, and that the Plaintiff-Appellee was entitled to all funds held in escrow at the Tucson office of the Valley National Bank of Phoenix after the above amounts had been paid into court (pp. 63-64, printed record).

From that Judgment this appeal is taken.

Specification of Errors.

I.

The District Court erred in rendering Findings of Fact and Conclusion of Law on the issue of waiver and judgment pursuant thereto because there was no evidence to support such Findings or Conclusion.

II.

The District Court erred in reaching its Conclusion of waiver and rendering judgment pursuant thereto because there was no allegation of waiver in the pleadings.

ARGUMENT OF THE CASE.

Argument of Specification of Errors I.

Summary.

Appellants contend that there was no evidence at the trial of this matter to support the following portions of the District Court's Findings of Fact and Conclusions of Law:

FINDING OF FACT VII.

[See p. 57, printed record.]

"When defendants received plaintiff's letter of November 5, 1956, . . . they knew that plaintiff was attempting to, and claiming the right to, terminate the Lease and Option without first making the payment and without first delivering the quitclaim deed. At that time, and thereafter until some date subsequent to January 1, 1957, although disputing with plaintiff the amount of money due to them as accrued rentals, defendants acquiesced in the termination of the Lease and Option agreement notwithstanding plaintiff had failed to make the $7,000.00 payment and to deliver the quitclaim deed. About November 16, 1956, defendants recognized that plaintiff's interest in the demised premises was ended. . . ."

CONCLUSION OF LAW V.

[See p. 61, printed record.]

"Defendants waived performance by plaintiff of the conditions precedent to plaintiff's right to terminate (being the conditions described in Conclusions of Law I and III) and the Lease and Option agreement was terminated upon such waiver and on or about November 16, 1956."

Argument.

The elements of waiver have been set forth on numerous occasions by the Arizona Supreme Court. However, the Court has not been altogether consistent in its discussion of the subject.

It has been said that waiver must be intentional and upon a consideration, or the act relied on must be such as to constitute an estoppel.

> *Davis v. Standard Accident Insurance Co.,* 35 Ariz. 392, 398, 278 Pac. 384, 386.

The element of consideration is not mentioned in the more recent case of *City of Tucson v. Koerber,* 82 Ariz. 347, 356, 313 P. 2d 411, 418; which defines waiver as the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right.

The latter definition also was used in *Southwest Cotton Co. v. Valley Bank,* 26 Ariz. 559, 563, 227 Pac. 986, 988, which preceded the Davis opinion cited above. The Arizona Court, in *Guarantee Title and Trust Co. v. Babbitt Brothers Trading Co.,* 47 Ariz. 47, 53; 53 P. 2d 734, 736, quotes both from *Southwest Cotton Co.* and the *Davis* cases in discussing the essential elements of waiver, then goes on to say:

> "It is not necessary that there be both consideration and estoppel. Either is sufficient, but one at least must exist to make a valid and irrevocable waiver."

Waiver is distinguished from estoppel in *The Equitable Life Assurance Society v. Pettid,* 40 Ariz. 239, 11 P. 2d 833, 838. At page 252 of the official report, the Court says:

> "In waiver, the essential element is an *actual intent* to abandon or surrender a right while in estoppel such

intent is immaterial, the necessary condition being the deception to his injury of the other party by the conduct of the one estopped."

The distinction again is made in *Waugh v. Lennard,* 69 Ariz. 214, 211 P. 2d 806, 812. At page 223 of the official report, the Court says:

> "Waiver is defined as a voluntary and intentional relinquishment of a known right, . . . whereas 'estoppel' means that a party is precluded by his own acts from asserting a right to the detriment of another who, entitled to rely on such conduct, has acted thereon."

It is submitted at this time that there was no finding of estoppel in the instant case on the issue of the Appellee's failure to deliver the quitclaim deed to the Appellants. There was no finding that such failure resulted from the reliance by Joralemon on any words or conduct of Albert. On the contrary, the trial court found, at page 60, printed record:

> "The failure to deliver the quitclaim deed to the defendants promptly after November 6, 1956, was occasioned by the oversight of John W. Hamilton, secretary of Homestake Mining Co., or of some other officer or agent of the Homestake Mining Co. . . ."

The same is true of the Appellee's failure to make the $7,000.00 quarterly payment. The trial court found, at page 60, printed record:

> "The failure to make proper remittance in connection with the $7,000.00 quarterly payment was occasioned by a dispute between the parties as to what portion of said payment was properly offset by expenditures made by plaintiff in clearing title to the demised premises and as to the proper proration period of such expenditures."

Waiver requires the concurrence of act and intent, although the intent may be manifested or inferred from the act. *(City of Tucson v. Koerber, supra.)* Where the intent must be inferred from conduct, and the conduct is such that reasonable minds may differ as to what the inference should be, waiver is a question of fact. *(Southwest Cotton Co. v. Valley Bank, supra.)* However, when the conduct relied on does not warrant the inference of a voluntary and intentional relinquishment of a known right, there is no waiver as a matter of law.

City of Tucson v. Koerber, supra.

See also:

Birkeland v. Korbet (Wash.), 320 P. 2d 635, 643;

Phoenix Insurance Company v. Heath, 90 Utah 187, 61 P. 2d 308.

This Court has discussed waiver in a case arising under California law, *Pacific States Corporation v. Hall* (C. C. A. 9th), 166 F. 2d 668. At page 671, the Court says:

> "Appellees contend that consideration is not always a requisite for waiver, but it is generally held that where substantial rights are involved, a waiver must be supported by a consideration to be valid. 56 Am. Jur. Sec. 16, page 117. At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right, or acts amounting to an estoppel on his part. 56 Am. Jur. Sec. 17, page 118; First National Bank vs. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; Johnson vs. Kaeser, 196 Cal. 686, 239 P. 324. No such intent, or course of conduct on the part of appellant, appears."

In *Buffum v. Chase National Bank of the City of New York* (C. C. A. 7th), 192 F. 2d 58, the Court at page 61 said of waiver:

> "It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion or retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forebears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible. 67 C. J. 311 and cases there cited."

A California Court has said:

> "A waiver of a right cannot be established without a clear showing of an intent to relinquish such right, and doubtful cases will be decided against a waiver."
>
> *Greninger v. Fischer,* 81 Cal. App. 2d 549, 554, 184 P. 2d 694, 697.

There is no evidence in the record of this matter of any conduct by Appellants warranting an inference of their relinquishment of any known right. There is no record of any conduct by Appellants inconsistent with their assertion of their rights under the Lease and Option Agreement.

The context of Mr. Joralemon's letter of November 5, 1956, is directly opposed to that portion of the District Court's Finding of Fact VII to the effect that when the Alberts received the letter of November 5, 1956,

> ". . . they knew that plaintiff was attempting to, and claiming the right to, terminate the lease and

option without first making the payment and without first delivering the quitclaim deed" [see pp. 57-58, printed record].

Mr. Joralemon, in that letter, after indicating his intention to surrender the lease and option, wrote the following:

> "The $7,000.00 payment due on November 8, 1956 will be paid when due, and the quitclaim deed specified in Paragraph 3 of the contract will be sent to you as soon as practicable" [see p. 134, printed record].

Contrary to the finding of the trial court, the Alberts were assured by Mr. Joralemon in the letter of November 5, 1956, that the payment would be made when due, and that the quitclaim deed would be sent as soon as practicable. The inescapable interpretation of the first paragraph of the letter [p. 134, printed record] is that Mr. Joralemon intended "to surrender the lease and option" on performance of the conditions precedent.

There is no evidence anywhere in the record that "defendants acquiesced in the termination of the Lease and Option notwithstanding plaintiff had failed to make the $7,000.00 payment and to deliver the quitclaim deed," as found by the Court [p. 58, printed record].

Acquiescence implies a knowledge of the facts; there can be no acquiescence without knowledge of the fact or facts alleged to have been acquiesced in. *(Connell v. Clifford,* 39 Colo. 121, 88 Pac. 850, 851.) There is no evidence in the record to show Appellant's knowledge that Appellee claimed the Lease and Option Agreement had been terminated without performance of the conditions precedent, prior to the filing of Appellee's Complaint in the District Court.

On the other hand, Mr. Joralemon's testimony at the trial gives ample evidence that he made no such claim. To that effect, see the following excerpts:

"Q. You took it to be your obligation under the lease to forward such a deed, right? A. Yes.

Q. What did you do to the end that such a deed be sent? A. I called up—I called up somebody in the Homestake office, I am not sure whom, and had sent them a copy of my letter to Mr. Albert and asked if they would take care of the quitclaim deed" [see pp. 156-157, printed record].

"Q. Within a day or two at the most of the date of this letter, November 5, 1956, you called Mr. Hamilton, the secretary of Homestake Mining Company, enclosing a copy of this and asking that he take care of the deed which you thought to be required, right? A. That is correct.

Q. Did you at any time subsequent to that time make any inquiry as to whether or not that had been done? A. I did not, not until after receiving Mr. Conner's letter in April or May" [see p. 157, printed record].

"Q. What did you do about settling the dispute about the money, if anything? A. I did nothing. I left that up to the lawyers.

Q. Did you call Mr. Driscoll and tell him that Mr. Albert was dissatisfied? A. I think I telephoned either Mr. Hamilton or Mr. Driscoll directly. Mr. Driscoll was traveling a lot of the time and hard to get. It may have been Mr. Hamilton" [see p. 159, printed record].

"Q. Let me ask you this, Mr. Joralemon, at any time after your discussion—first I will ask you this, at any time after your letter of November 5, 1956, in

which you gave notice of your intention to surrender or your notice of surrender, whatever the case may be, at any time after that time, what, if anything, did you do to bring about a revocation of the contract other than calling Mr. Hamilton and asking that the deed be sent and the money be transmitted, did you ever after that time do anything at all? A. I did not. I assumed nothing else was necessary.

Q. You of course relied on Mr. Hamilton to get the deed out and relied on your attorneys to get the proper amount of cash down here? A. That is correct.

Q. I suppose you were somewhat astounded when you got Mr. Conner's letter of April 16th calling your attention to the fact that no deed had ever been sent? A. I was very much surprised that Greenway Albert had not let me know of it earlier.

Q. Were you surprised the secretary of Homestake Corporation hadn't let you know? A. Yes, I was surprised I had heard nothing about it from anybody" [see p. 160-161, printed record].

It is to be noted that the District Court's Conclusion of Law V [p. 61, printed record] places the alleged waiver on or about November 16, 1956. It is the telephone conversation of that date, then, that must warrant the inference of the voluntary relinquishment of a known right.

Mr. Albert's failure to demand a quitclaim deed in the telephone conversation could not possibly warrant such an inference. Even if the law generally were to impose a duty to demand the performance of a condition precedent as the alternative to waiving such performance (and Appellants do not understand such to be the law), there could be no such duty in the instant case. Certainly, after Mr. Joralemon had professed his intention to perform the con-

ditions precedent to the exercise of his option to terminate the agreement, Mr. Albert had no duty on November 16, 1956, or at any subsequent time, to demand such performance.

This Court stated, in *Pacific States Corporation v. Hall, supra,* at page 671:

> "The mere fact that interest was not listed in the statement, either because of some oversight or because the indebtedness at that time appeared to be far greater than the creditor could reasonably expect to recover from Appellees, does not constitute a waiver of the right to claim such interest."

In line with the above, Mr. Albert's failure to demand performance on November 16, 1956, which had already been promised in Mr. Joralemon's letter of November 5, 1956, could not possibly constitute a waiver of the right to such performance.

It is respectfully submitted that the only act of Appellants, or either of them, alluded to by the trial court in reaching it Finding of Fact VII, upon which Conclusion of Law V apparently is based, occurred in the telephone conversation on or about November 16, 1956. Specifically, the lower Court found:

> "About November 16, 1956, defendants recognized that plaintiff's interest in the demised premises was ended *and defendant, Mr. Albert, requested and received from plaintiff the drilling logs pertaining to the demised premises"* [see p. 58, printed record].

Mr. Albert's request for the drilling logs was the exercise of an express right under Paragraph 6 of the Lease and Option Agreement. Paragraph 6 provides, *inter alia:*

> "The lessor shall have the right to enter the property at any reasonable time for inspection thereof and development reports shall be available to him" [see p. 121, printed record].

As the assertion of a right under the agreement, and particularly so at a time when Appellee had indicated an intention to terminate in his letter of November 5, 1956, Mr. Albert's request for the drilling logs on November 16 was anything but evidence that "defendants recognized that plaintiff's interest in the demised premises was ended. . . ."

At this point, Appellants' two specifications of error necessarily overlap to some degree. In the absence of any allegation or argument on the issue of waiver in the trial court, the court's attention at no time was directed to the provision above quoted from Paragraph 6 of the Lease and Option Agreement, in explanation of Mr. Albert's request of November 16, 1956.

Appellants forcefully contend herein that there was no evidence of any conduct on their part which warranted an inference of the voluntary relinquishment of a known right. Further, the trial court's reference to the request for the drilling logs, in its Finding of Fact supporting its Conclusion of waiver, clearly shows that Appellants were misled to their injury by the absence of any allegation of waiver in the pleadings. On the issues raised by the pleadings, Appellants had no reason to introduce evidence showing that the request for the drilling logs was referable to the Lease and Option Agreement.

Argument on Specification of Errors II.

Summary.

Appellants contend that the District Court as a matter of law was precluded from finding that they waived performance of the conditions precedent to Appellee's right to terminate the Lease and Option to Purchase Agreement, because there was no allegation of waiver in the pleadings.

Argument.

Waiver is an affirmative defense and must be pleaded.

> *Allstate Insurance Company v. Moldenhauer* (C. C. A. 7th 1952), 193 F. 2d 663, 665.

It is permissible under the Federal Rules for a party to set forth affirmatively any defense he may have and he is required to do so as to defenses enumerated in Rule 8(c), Federal Rules of Civil Procedure, 28 U. S. C. A.; *Mitchell v. American Republic Insurance Company* (D. C. Iowa 1956), 20 F. R. D. 115, 116.

An affirmative defense must be pleaded to prevent surprise.

> *Carr v. National Discount Corporation* (C. A. Mich. 1949), 172 F. 2d 899, 903.

In pleading an affirmative defense, the pleader need do no more than give the adverse party fair notice of the nature of the defense.

> *Edmonds v. United States* (D. C. Wisc. 1957), 148 Fed. Supp. 185, 186.

While it is not necessary to plead the defense of waiver by name, it is submitted that the pleadings in this matter contain no allegations of acts or conduct constituting

waiver, as defined by the Arizona Supreme Court in *City of Tucson v. Koerber, supra.*

At most, the allegations of Paragraph 8 of Plaintiff's Complaint [pp. 7-8, printed record] raised the issue of estoppel. The Complaint alleges Defendants-Appellants failed to act in a number of respects, although it does not allege any duty to act.

Most important, the Complaint nowhere alleges the intent that is an indispensable element of waiver.

Conclusion.

In the absence of any evidence of waiver, or any allegation thereof in the pleadings, the District Court as a matter of law was precluded from finding that Appellants had waived performance of the conditions precedent to Appellee's right to terminate the Lease and Option to Purchase Agreement.

Under the District Court's other Findings of Fact and Conclusions of Law, the said Lease and Agreement therefore remained in full force and effect until terminated May 31, 1957, by Appellee pursuant to the power to terminate contained therein.

As a result, Appellee is indebted to Appellants in the following amounts:

1. Interest on the sum of Two Thousand Six Hundred Sixteen and 52/100 ($2,616.52) Dollars from November 8, 1956, to January 8, 1957, at 6% per annum.

2. The sum of One Thousand Three Hundred Thirty and No/100 ($1,330.00) Dollars together with interest thereon from January 8, 1957, until paid at the rate of 6% per annum.

3. The sum of One Thousand and No/100 ($1,000.00) Dollars together with interest thereon at the rate of 6% per annum from December 8, 1956, until paid.

4. The sum of One Thousand and No/100 ($1,000.00) Dollars together with interest thereon at the rate of 6% per annum from January 8, 1957, until paid.

5. The sum of Eight Thousand and No/100 ($8,000.00) Dollars, representing the regular monthly payment of One Thousand and No/100 ($1,000.00) Dollars plus the second quarterly payment of Seven Thousand and No/100 ($7,000.00) Dollars, together with interest thereon at the rate of 6% per annum from February 8, 1957, until paid.

6. The sum of One Thousand and No/100 ($1,000.00) Dollars together with interest thereon at the rate of 6% per annum from March 8, 1957, until paid.

7. The sum of One Thousand and No/100 ($1,000.00) Dollars together with interest thereon at the rate of 6% per annum from April 8, 1957, until paid.

8. The sum of Eight Thousand and No/100 ($8,000.00) Dollars, representing the regular monthly payment of One Thousand and No/100 ($1,000.00) Dollars plus the third quarterly payment of Seven Thousand and No/100 ($7,000.00) Dollars, together with interest thereon at the rate of 6% per annum from May 8, 1957, until paid.

For the reasons above-stated, the Judgment of the District Court should be reversed, insofar as it places the termination of the lease prior to December, 1956, and entitles Appellee to funds held in escrow at the Tucson office of The Valley National Bank of Phoenix, and Judgment entered for the Appellants on Count One of

their Amended Counterclaim in the sum of Twenty-One Thousand Three Hundred Fifty-Six and 17/100 ($21,-356.17) Dollars, together with interest from the due dates, plus costs incurred by Appellants-Defendants in the trial of this matter in the District Court, and costs incurred by Appellants in this appeal.

Respectfully submitted,

GATEWOOD & GREENWAY

McCARTY, CHANDLER & UDALL

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Attorneys for Appellants.

APPENDIX OF EXHIBITS.